

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 95-720-C - ORDER NO. 95-1489 ✓

AUGUST 30, 1995

IN RE: Application of Bellsouth	)	ORDER
Telecommunications, Inc. DBA	)	DENYING
Southern Bell Telephone &	)	MOTIONS
Telegraph Company for	)	
Approval of an Alternative	)	
Regulation Plan	)	

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Motion of the Consumer Advocate for the State of South Carolina (the Consumer Advocate) to Dismiss and the Motion of the South Carolina Cable Television Association (SCCTA) to Dismiss or, in the Alternative to Sever. For the reasons stated below, both Motions must be denied.

The Commission has examined the Motions presented and believes that they are analogous to a Rule 12(b)(6) Motion under the South Carolina Rules of Civil Procedure. The Commission believes that, much as the South Carolina Rules of Civil Procedure govern all discovery matters not covered in Commission Regulations 103-850 through 103-852 (See 103-954), the Commission must look to the remainder of the South Carolina Rules of Civil Procedures for matters not governed in the Commission's own Rules of Practice and Procedure. (See Regulation 103-800(B)). South Carolina Rule of Civil

Procedure 12(b)(6) provides for a Motion to Dismiss on the grounds of failure to state facts sufficient to constitute a cause of action, and also provides for matters outside of the complaint to be presented by the Motion to the Court. In such a case, it should be treated as a Summary Judgment Motion and disposed of pursuant to Rule 56. Lee v. Kelly, 298 S.C. 155, 378 S.E.2d 616, (Ct. App. 1989). Clearly, the Motion in the case at bar is based on more than the Application, and also includes the prefiled testimony involved. Therefore we believe that the motions must be decided under the standards for Summary Judgment governed by South Carolina Rule of Civil Procedure 56.

Summary Judgment may be rendered only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. There must also be shown that further inquiry into the facts of the case is not desirable to clarify the application of law. In ruling on a Motion for Summary Judgment, a court must construe all ambiguities, conclusions, and inferences arising in and from the evidence most strongly against the moving party. Lyles v. BMI, Inc., 292 S.C. 153, 355 S.E.2d 282 (Ct. App. 1987)

An examination of the Motions in the case at bar under this standard leads us to hold that the Motions should be denied.

The Consumer Advocate's Motion to Dismiss proceeds to cite certain provisions of the Company's Plan in the case at bar, and then proceeds to argue the meaning of the provisions. Further, the Consumer Advocate argues that the criteria of S.C. Code Ann. Section 58-9-575 are not met by the materials submitted by Southern Bell. It appears to the Commission that the Consumer Advocate raises questions of material fact in the present case. Therefore, under the standard elucidated above by our Courts, the Motion must be denied.

Similarly, the Motion of the South Carolina Cable TV Association raises a number of issues of material fact. For example, SCCTA states that SC Code Ann. Section 58-9-575 requires that, before implementation of a regulatory alternative, a telephone utility must show that it is "subject to competition with respect to its services". The Motion raises doubt about whether or not Southern Bell meets this standard. Further, SCCTA states that Southern Bell's prefiled Direct Testimony does not contain evidence regarding availability, market share or price of comparable alternatives to the services that Southern Bell deems to be competitive.

We do not agree that Southern Bell's testimony is devoid of such information. We do believe however, that

further inquiry is warranted. Based on the Lyles standard as quoted above, which states that it must be shown that further inquiry into the facts is not desirable to clarify the application of the law before a Motion for Summary Judgment may be granted, we must deny this portion of SCCTA's motion.

SCCTA further moves, in the alternative, that if the Commission chooses not to dismiss Southern Bell's Application, that the alternative regulation docket be severed from the earnings review docket, and that a separate hearing in the alternative regulation docket be held at a later date. The Commission has examined this matter in a prior order and rejected the notion that the matters should be severed.

Having disposed of the arguments presented in the Motions of the Consumer Advocate and the SCCTA, we hereby hold that the motions must be denied.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

  
Chairman

ATTEST:

  
Executive Director

(SEAL)